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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 65

THE UNITED STATES, PETITIONER

v.

CALLAHAN WALKER CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 11–21) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1942 (R. 21). The petition for a writ of certiorari was filed April 1, 1942 (R. 106), and granted May 11, 1942. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether an equitable adjustment made under Article 3 of the standard form Government construction contract constituted a determination of fact so as to be final and binding in the absence of an appeal to the department head in accordance with Article 15.

2. Whether the equitable adjustment was final and binding even if it constituted a determination of law.

STATEMENT

In 1931 respondent and the United States entered into a written contract for the construction of a levee on the Mississippi side of the Mississippi River, by which the respondent agreed to place approximately 3,881,600 cubic yards of earth work for 14.43¢ per cubic yard (R. 4, 5). The proposed levee was to be set back a short distance from an existing levee; the earth in the existing levee, together with the earth borrowed from certain land between it and the site of the new levee, were made available for the construction (R. 5–6). This controversy involves additional work on an enlarged false berm[1] which was constructed in connection with a section of the new levee extending from station 5113 southward to station 5123, a distance of 1,000 feet (R. 5–6).

[1] A false (or artificial) berm is an earthwork, extending on either side of the base of a levee, which reinforces the foundation of the levee proper.

Respondent began work at the south end of the project, and proceeded northward. In the course of this work, however, after respondent had completed 68 percent of the construction between stations 5123 and 5113, parts of the levee already constructed south of station 5123 were found to have a tendency to subside. As a result, on October 7, 1932, the contracting officer for the United States directed respondent to stop work on the section between stations 5123 and 5113 and to resume construction of the levee from a point north of station 5113 while investigations were being conducted to determine the cause of the subsidence. (R. 6.) After investigation the contracting officer concluded that the construction of an enlarged false berm, not called for in the original specifications,[2] would forestall any subsidence in the section from station 5123 to station 5113. Accordingly, on October 18, 1932, the contracting officer issued a written order to respondent directing con-

[2] The original specifications provided for a false berm, between station 5116–46 and station 5119, "100 feet wide landside and 100 feet wide riverside, * * * with a level crown at grade of 118 feet mean gulf level (net) with side slopes of 1 on 2 from edges of crown to natural surface" (R. 6). The change order additionally provided for a riverside false berm from station 5113 to station 5123 "having a riverside crown elevation of 120 feet M. G. L. at a distance of 250 feet from the centerline and sloping upward toward the levee on a 1 on 18 slope and downward to the ground surface on a slope of 1 on 6" (R. 6–7). This involved an increase of 64,469 cubic yards to be placed for berms in this section over the amount estimated originally in the specifications (R. 8).

struction of an enlarged false riverside[*] berm. The order advised respondent that it would be given 100 percent credit for the embankment to the south of station 5123 where the subsidence had occurred, and that payment for additional yardage made necessary by the construction of the false berm would be made at the contract price per cubic yard. (R. 6–7.) The additional work required by the change order was necessary for completion of the project (R. 7).

Article 3 of the standard form Government construction contract, utilized here, provides (R. 64):

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is

[*] The United States undertook to, and did, construct an enlarged berm on the landside of the levee (R. 10).

ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.[4]

Article 15 provides as follows (R. 68):

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Concerning the respondent's negotiations and protests relating to the contracting officer's order of October 18, 1932, the court below found only that the order was issued "against plaintiff's [respond-

[4] Paragraph 14 of the specifications provides as follows (R. 84):

"14. *Modification of specifications.*—The right is reserved to make such changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated; but no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into."

ent's] objections" on the ground that the order constituted a change in the contract and that an extra price should be allowed; it also found that respondent gave oral notice to the contracting officer that it would later assert a claim for the extra costs which it expected to incur in constructing the berm (R. 6). The court below found further that in the course of constructing the berm, it developed that additional material had to be hauled or drifted into the site of the work, that sufficient material was not available on the riverside of the levee opposite the section in question, and that the work of drifting or hauling in the material was performed by a subcontractor who agreed to accept the contract price in full payment if respondent were unable to secure an additional allowance from the United States (R. 8–9). In addition, the court found that at the completion of its work, respondent accepted the last payment "under protest" (R. 9).

The court made no other findings relating to the respondent's negotiations, protests, or other steps in connection with the contracting officer's order. The evidence, however, established the facts as to the relevant course of events.

Respondent's protests were confined to the period preceding the issuance of the change order on October 18, 1932 (R. 23–24, 25–26, 39, 42–43). This is established by respondent's own testimony and is not disputed. It is also undisputed that subse-

quent to the issuance of the order, respondent made no claim for an equitable adjustment, and made no appeal to the head of the department (R. 24, 26, 27–28, 31).

In respect of respondent's negotiations, preceding the issuance of the change order, with petitioner's engineers as to the new enlarged berm, there is testimony that respondent's officers, on October 13 and 14, 1932, claimed that the work could not be performed at the contract price because there was not sufficient material readily available at the site (R. 23, 39, 40, 49, 56–58), that additional material would have to be brought to the site from other points, and that the cost per yard of handling this additional material would exceed the contract price (R. 41, 44–45, 56–58).[4] The contracting officer and the engineer in charge testified that they had been of the opinion that adequate material was available at the site, that no increase in cost would result (R. 27, 28, 29, 30, 32), and that, if this had not been their view, they would not have stipulated the contract price in issuing the order (R. 29). They accordingly issued oral instructions on October 14, 1932, to respondent to erect the enlarged false berm (R. 27, 31, 32) which were confirmed by the formal order of October 18, 1932 (R. 6, 27, 32).

[4] There is also some testimony, however, that respondent did not rely on the shortage of adequate material in the discussions with petitioner's engineers (R. 30, 49, 50–51, 56).

Respondent's officers testified that they had understood that petitioner's contracting officer had agreed that they could proceed on a cost plus basis, and that a bill for "extra costs" would be submitted at the completion of the work (R. 24, 26, 42, 47, 58–59); they testified that they had regarded the written order of October 18 to be "just for a matter of record" (R. 59, 46). Petitioner's contracting and engineer officers denied that any agreement for payment on a cost plus basis had been made or that the written order differed from the oral directions (R. 27–30, 31, 33, 47–48, 50). These officers testified that they had merely informed the contractor that if it was dissatisfied with this order it could present a claim buttressed by detailed proof of its costs (R. 33–34, 47–48) and that it "had a right to protest the ruling of the District Engineer," who was the contracting officer (R. 34). Respondent's witnesses themselves admitted that no promise of payment on a cost plus basis had been made to them (R. 45–47). The findings and opinions of the court below clearly show that it gave no weight to this contention of respondent's (R. 6–7, 11–12, 18, 19).

Respondent was paid for the additional work at the contract rate of 14.43¢ per cubic yard (R. 8) which it accepted under protest (R. 8–9). On December 28, 1932, it filed a claim with the contracting officer for $16,952.79, as representing the ex-

cess cost of the additional work over the contract price (R. 10–11). No part of the claim was paid, and respondent filed suit in the Court of Claims on August 6, 1935. The court entered judgment for respondent in the sum of $13,989.92, Judges Madden and Jones dissenting.

The majority of the court held that the making of an "equitable adjustment" under Article 3 constitutes the determination of a question of law (R. 14, 17, 18–19) and that since Article 15 limits the contracting officer's authority to settle disputes to questions of fact only, the officer was without authority to resolve disagreements concerning the amount of an adjustment under Article 3 (R. 18–19). Accordingly, it held that the contractor's failure to appeal to the department head in the manner provided by Article 15 was immaterial (R. 17, 19) and that the court below was entitled to make an independent determination of the amount which should be allowed the respondent as an equitable adjustment for any increased cost caused by the change order (R. 17, 19). The "opinion of the court," delivered by Judge Green, and concurred in on this point only by Chief Justice Whaley, also rests on the alternative ground that the contracting officer had failed to make the equitable adjustment required by Article 3, and that this constituted a breach of contract (R. 12, 13, 17).

SPECIFICATION OF ERRORS TO BE URGED

The court erred:

1. In holding that it had authority to review the order of the contracting officer and to substitute its own judgment for that of the contracting officer.

2. In holding that what constitutes an equitable adjustment under Article 3 of the contract is a question of law.

3. In holding that the order of the contracting officer specifying the contract price per cubic yard for additional yardage constituted a conclusion of law and not a decision on a disputed issue of fact within the meaning of Article 15 of the contract.

4. In holding that the contracting officer was without authority to decide any issue of law arising under Article 3 of the contract.

5. In failing to hold that the contracting officer had made any equitable adjustment required by Article 3 of the contract.

6. In making an independent determination concerning the amount due respondent as an equitable adjustment under the change order.

7. In failing to find as facts that respondent made no claim for adjustment within ten days from the date of the order of the contracting officer and that respondent took no appeal to the head of the department within thirty days from the date of the order in accordance with Articles 3 and 15 of the contract.

8. In failing to hold that the order of the contracting officer, in the absence of an appeal to the

head of the department as provided in Articles 3 and 15 of the contract, was final and binding, and not subject to judicial review on any issues of fact or law arising under Article 3 of the contract.

9. In failing to hold that the order of the contracting officer could not be set aside when no appeal therefrom had been taken to the head of the department.

10. In entering judgment for the respondent.

SUMMARY OF ARGUMENT

A. As an alternative basis of their holding that respondent was entitled to recover, two of the judges of the court below concluded that the contracting officer wholly failed to make an equitable adjustment as required by Article 3 and, that therefore, a breach of the contract occurred. The conclusion is based solely upon an inference thought to arise from the fact that the contracting officer set as the rate per cubic yard for the extra work the same rate which had been originally prescribed for the work contemplated in the contract, although subsequent events proved the extra work to be more costly. But the undisputed evidence establishes the inference to be untenable. The record plainly shows that the contracting officer recognized both that the order constituted a change in the specifications of the contract and that an equitable adjustment was necessary. He investigated the availability of the

material for the extra work and considered the cost of such work. After such investigation, he prescribed the rate which he thought would compensate for the work. Clearly, therefore, he purported to make an adjustment of the amount due under the contract in a sum he thought equitable.

B. The disputed issue resolved by the contracting officer in making the equitable adjustment was solely one of fact. The question was whether, and the extent to which, the added work increased the cost; this depended in turn upon such issues as the availability of the necessary material, its location, its suitability, the machinery required and similar factors. That these questions were factual is plain both as an original matter and under well-established principles. For it is settled that the question of the extent to which costs are increased by changes in a contract is one of fact; similarly it is settled that issues of "reasonable price" in general contract law and of "reasonable value" in eminent domain proceedings are normally factual and susceptible of final determination by nonjudicial fact-finding tribunals.

These principles are decisive here; no different conclusion is compelled, as the majority of the court below thought, by this Court's decisions in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106,

and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434. Those cases, dealing only with the terms "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act are inapposite here. And since in this case the issue resolved was entirely one of fact, the contracting officer's decision was final and conclusive in the light of respondent's failure to appeal the decision to the department head as prescribed by Articles 3 and 15 of the contract.

C. But even if the disputed issue determined by the contracting officer were an issue of law, the contracting officer's equitable adjustment would be final under Article 3 in the absence of appeal. Article 3 gives the contracting officer full power to make equitable adjustments; the power is not confined to issues of fact. Since Article 3 provides that all disputes relating to equitable adjustments shall be determined in the manner prescribed by Article 15, we think that the parties intended to authorize the contracting officer's final resolution of legal, as well as factual, issues. Since this is so, whatever may be the correct characterization of the disputed issue, respondent is precluded from recovery since the contracting officer's determination was conclusive in the absence of appeal.

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ARGUMENT

THE CONTRACTING OFFICER'S UNAPPEALED ORDER THAT THE ADDITIONAL WORK WAS TO BE PERFORMED AT THE CONTRACT PRICE PRECLUDES RECOVERY OF ANY LARGER AMOUNT

It is not disputed that the construction of the enlarged false berm ordered by the Government's officers was a change in the specifications of the original contract, and within their general scope. Article 3 of the contract was therefore admittedly applicable (Resp. to Pet., pp. 1, 2, 3). Article 3 requires an "equitable adjustment" to be made if such a change causes an increase or decrease in the amount due the respondent under the contract or in the time required for its performance. Machinery is established by this article for the determination by the contracting officer of the proper "equitable adjustment," and for the resolution of disagreements between him and the contractor by appeal to the head of the department. But respondent, without invoking this contractual appeal procedure, seeks recovery, through judicial action, of excess costs incurred because of the change. The majority of the court below held that respondent's course was proper and that respondent was not required to follow the procedure provided by Articles 3 and 15 of the contract since those articles confer no finality upon a contracting officer's finding that an adjustment is "equitable." The court held, therefore, that administrative appeal was unnecessary and that it was entitled in-

dependently to determine whether the adjustment was "equitable."

A. *The contracting officer purported to make an equitable adjustment under Article 3*

The central issues in this case, and those concerning which we petitioned for certiorari, are (1) whether an equitable adjustment made, in the circumstances of this case, by the contracting officer, is a determination of fact or law, and (2) whether the contracting officer's equitable adjustment is conclusive in the absence of appeal by respondent. It is our position that the determination made by the contracting officer was a determination of issues of fact only and not of "legal" issues, such as those involved in the construction of the contract or specifications, and that, consequently, the contracting officer's unappealed adjustment is conclusive. We shall contend further that even if the contracting officer's adjustment constituted a determination of law, it is final and binding under Article 3 of the contract.

But at the threshold of the inquiry into these issues we are met by respondent's contention, accepted by two judges of the court below as an alternative ground for their decision, that in any event the contracting officer did not here make any adjustment at all since he merely prescribed the existing contract rate; a breach of contract, accordingly, was said to result (R. 12, 13, 17).

Before we discuss the central issues, therefore, we shall examine the question whether in fact the contractor made an equitable adjustment as required by Article 3.

The conclusion of Judge Green and Chief Justice Whaley that the contracting officer had wholly failed to make the adjustment required by Article 3 (R. 12, 13, 17),* was based upon the fact that, as appears from the face of the change order (R. 7), the contracting officer allowed a price per cubic yard for the additional yardage identical to the price per yard provided for in the contract, although, as the two judges thought, "the findings show clearly changed conditions which [actually] made the additional work more costly not merely in quantity but per yard" (R. 12). It was, accordingly, apparently inferred that the contracting officer must have construed the contract automatically to require respondent to supply the added earth at the contract price without regard to whether any increase in cost would result (R. 12, 13). But the undisputed evidence is plainly to the contrary. The record readily establishes that the contracting officer, Major Larkin, fully recognized that a change within the scope of Article 3 was contemplated and determined that the same price as that paid the contractor for its work on the levee (14.43 cents per cubic yard) was fair compensation

* It is to be noted that the court's findings of fact contain no such finding.

for the work to be done in constructing the enlarged false berm, since in his view sufficient extra material was readily accessible and could be secured by the same methods as those then being used by the contractor.

Major Larkin clearly understood that this order constituted a change in the specifications of the contract (R. 27) and that the order required an equitable adjustment. He issued the order under Paragraph 14 of the Specifications (R. 27), which reserves to the United States the right "to make such changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated" (R. 84); the paragraph adds that "no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into." This latter provision plainly refers to and incorporates Article 3 of the contract. Major Larkin, acting under these provisions, set the unit contract price as that to be paid for the extra work, not because he construed the original terms of the contract to require it, but because he was of the opinion that the enlarged berm could be constructed in the same manner as respondent had been building the levee (R. 28–30). Respondent alleges that it claimed that its costs would be increased because sufficient material was not readily available and would have to be hauled from a dis-

tance, but the contracting officer thought "there was sufficient material opposite those stations in the limits of the right-of-way for the completion of the river-side false berm, and completing the levee" (R. 28, 30). This material appeared to Major Larkin to be "suitable" and "satisfactory" (R. 28, 29, 30). He considered the cost to the contractor and would not have ordered the work to be done at the contract price if he had thought the material available nearby was not suitable and could not be handled by respondent's tower machine, and that material would have to be hauled or drifted to within reach of the machine (R. 29–30). The engineer officer, Lieutenant Pence, also thought there was ample suitable material within the right-of-way available for construction purposes (R. 32). The Government officers had investigated "to be sure there was sufficient dirt there" (R. 29, 51). Moreover, they expressly pointed out to the contractor that it had the right to protest the contracting officer's ruling (R. 33–34, 47–48).

This uncontradicted testimony, therefore, plainly establishes that the contracting officer purported to make an adjustment of the amount due under the contract in a sum which he thought equitable.[7]

[7] Article 3 requires all changes "involving an estimated increase or decrease of more than Five Hundred Dollars" to be "approved in writing by the head of the department or his duly authorized representative." The change in question involved an estimated increase of more than five hundred dollars, but was not approved by the head of the department.

The fallacy of respondent's contention in respect of this issue lies in the unwarranted assumption that since the cost of the work on the enlarged berm *subsequently* proved in fact to be greater than the cost of the work on the levee, the contracting officer could not have thought otherwise at the time he made his estimate and issued the change order, and must therefore be taken to have intended no "adjustment." See e.g. R. 12. But clearly the mere fact that the contracting officer's judgment concerning the availability of material and the cost per cubic yard ultimately proved to be erroneous does not warrant the conclusion that he did not attempt to make an adjustment at all.[8] Nor can the sug-

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Cf. R. 60. Judge Green's opinion states that the contracting officer was the duly authorized representative of the head of the department "and has so been treated in all of our decisions" (R. 12). But cf. Art. 18 (a), R. 69. The Government's petition for a writ of certiorari did not present this question, and, without agreeing with Judge Green's interpretation, we shall not urge the contention here. We may point out, however, that if the change order was not properly issued under Article 3 because of the failure to secure the approval of the Secretary of War, respondent, under the well-accepted rule, can recover nothing for extra work done under such an invalid directive. *Hawkins* v. *United States*, 96 U. S. 689; *Plumley* v. *United States*, 226 U. S. 545, 547–548; *Hardwick* v. *United States*, C. of Cls., No. 43428, decided January 5, 1942; *McGlone* v. *United States*, C. of Cls., No. 43828, decided April 6, 1942, slip sheet, pp. 27–28.

[8] The contention also seems to be that no "change" in compensation contemplated by Article 3 was made because there was no addition to the contract price per cubic yard. But there obviously was an increase in the amount due the respondent under the contract within the meaning of Article

gestion be entertained that the "adjustment" must be made after the completion of the work, when the actual costs can be more accurately calculated. Article 3 clearly requires the adjustment to be made contemporaneously with or soon after the change order is issued as the establishment of a price in advance, exactly as is the setting of the original contract price before the contract work is begun. The adjustment is to be a modification of the original contract in advance of performance, either by agreement of the parties or by decision of the officers appointed in the contract for that purpose. Such is the only permissible construction of the terms of Article 3, and, we are informed, such has been the uniform understanding of that provision by Government contracting officers and contractors alike.

B. *The contracting officer's unappealed equitable adjustment under Article 3 is final and binding since the disputed issue determined by the officer was solely one of fact*

By failing to appeal to the head of the department (the Secretary of War) from the equitable adjustment made by the contracting officer, respondent neglected to pursue the departmental remedy expressly provided by the contract. Article 3 of the contract provides that if the parties

3, and that provision does not require higher unit prices to be paid for additional work where the contracting officer is of the view that the existing prices will fairly compensate for the extra performance required.

cannot agree upon an adjustment the dispute shall be determined as provided in Article 15.[9] The latter article, in turn, provides that all disputes concerning questions of fact shall be decided by the contracting officer, subject to written appeal to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact.

It is settled that failure to exhaust the administrative remedy by not taking the appeal provided by Article 15 and similar contract clauses constitutes a complete bar to suit in the Court of Claims to recover sums greater than those allowed by the contracting officer.[10] And it is equally well established

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[9] Article 3 also requires any claim by a contractor for adjustment under that article to be asserted within ten days from the date the change is ordered. Respondent made no such claim within ten days after the change order was issued on October 18, 1932, but there is evidence and the court below found that it did protest prior to the issuance of the formal order and its position was known to the Government's officers at that time (R. 6, 19–20).

[10] *Bray* v. *United States*, 46 C. Cls. 132, 138–139; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734; *Horace Williams Co.* v. *United States*, 85 C. Cls. 431, 441; *John McShain, Inc.* v. *United States*, 88 C. Cls. 284, 299, reversed on other grounds, 308 U. S. 512, 520; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *General Contracting Co.* v. *United States*, 92 C. Cls. 5, 12–13, 29; *Jacob Schlesinger, Inc.* v. *United States*, 94 C. Cls. 289; cf. *Steel Products Eng. Co.* v. *United States*, 71 C. Cls. 457, 476; *Winchester Mfg. Co.* v. *United States*, 72 C. Cls. 106, 138. Compare the analogous doctrine in the field of administrative law that a failure to

that a contracting officer's unappealed determination of an issue of fact, under a clause such as Article 3, is conclusive upon the contractor, the Government, and the court, especially in the absence of fraud, bad faith, or gross error implying bad faith.[11]

While respondent's petition in the court below makes no claim that the contracting officer acted arbitrarily, fraudulently, or in bad faith (R. 1–3), and the court below did not so find (R. 16), respondent nevertheless contended, and the majority of the court agreed (R. 17, 18, 19), that these settled principles are inapplicable here since the contracting officer's equitable adjustment of the amount due respondent for the construction of the enlarged berm involved not a question of fact, but one of law, which neither the contracting officer nor the head of the department was author-

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exhaust administrative remedies precludes resort to the courts. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 51; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (App. D. C.), certiorari denied, 305 U. S. 625; Berger, *Exhaustion of Administrative Remedies* (1939), 48 Yale L. J. 936.

[11] *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185; *McIntyre* v. *United States*, 44 C. Cls. 448, 452–3; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549, 561; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266.

ized to decide (R. 17, 18, 19). It was held that what is an equitable adjustment is always an issue of law concerning which the court must make an independent determination. Although at a subsequent point (*infra*, pp. 31–34) we shall urge that even if the equitable adjustment may be deemed the determination of a question of law the contracting officer's decision was conclusive, we nevertheless submit that in any event the majority of the court below was in error since in this case the only disputed issue involved in the determination of the proper "equitable adjustment" was one of fact; the contracting officer's decision, accordingly, was conclusive.

Every adjustment of the contract amount under Article 3 involves, of course, some general value judgment made by the deciding officer upon the basis of his conception of what is "equitable" in the circumstances. In certain cases there may be disagreement between contractor and contracting officer on the applicable major proposition, and the issue may or may not be termed "legal." But here there is no such dispute.[12] Respondent con-

[12] There are, of course, many issues involving value judgments as to what the circumstances require, which present questions of "fact" for the contracting officer's decision, just as determinations of "reasonableness" or "fairness" are frequently for the jury at common law, or for an administrative tribunal acting under a regulatory statute. Henderson, *The Federal Trade Commission*, pp. 92–103; Isaacs *The Law and the Facts* (1922) 22 Col. L. Rev. 1; Bohlen, *Mixed Questions of Law and of Fact* (1924) 72 U. of Pa. L. Rev. 111; Thayer, *A Preliminary Treatise on Evidence*, 190 *et seq.*, 202–3; cf.

tends only that it is entitled to an amount sufficient to compensate it for its over-all increase of cost, if any, and the Court of Claims purported to give it no more. Petitioner's contracting officer made exactly the same assumption (R. 28-30). As we have shown, he assumed that the price for the additional work should be so fixed as to compensate the contractor for the value of the additional work and for increases of cost, if there were any, and to permit operation without loss. The sole inquiry was directed toward ascertaining the extent to which the change order would result in an increase of cost; this issue, even though partially involving prediction of future events, as well as observation of the present and the past, is plainly a question of fact and not one of law. Cf. *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, 526. The contracting officer decided that sufficient material was readily available to enable the respondent to handle the material and construct the enlarged berm in the same manner in which it had proceeded on the work already completed, and that, accordingly, the unit cost for the extra work would be identical with the unit cost of constructing the levee and berm originally specified in the contract.

Gray v. *Powell*, 314 U. S. 402; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, Nos. 265, 268, Oct. Term, 1941, decided March 16, 1942; *Board of Trade* v. *Olsen*, 314 U. S. 534, 546. See *infra*, pp. 26–29. Our contention is that the present case is *a fortiori*, since it does not even present an issue of this type.

(R. 28–30). That after the event, the Court of Claims decided that the contracting officer's decision was erroneous does not make it any the less a determination of fact in the most usual sense. And it is plain that mere error does not vitiate the contracting officer's authorized determinations of fact.[13] See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553–554; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185, 195.

It is settled that the question of the extent to which a contractor's costs will be increased by changes in his contract is one of fact. The Court of Claims has frequently characterized determinations by contracting officers of the amount of increase in cost caused by a change order under Article 3 or 4[14] of the standard form contract as fac-

[13] As Judge Madden pointed out, "the contracting officer's decision as to the price was near enough to being right so that the plaintiff's subcontractor was willing to agree to do the work for that price, if it turned out to be all that plaintiff received from the Government" (R. 21).

[14] Article 4 of the standard form contract provides that if the contractor for the Government discovers during the progress of the work subsurface or latent conditions at the site materially different from those shown on the drawings or indicated in the specifications, such conditions shall be called to the attention of the contracting officer, who shall thereupon investigate them. If he finds that they differ materially from the conditions shown in the drawings or specifications, he is required to make such changes in the drawings or specifications as he may find necessary, with the written approval of the head of the department, "and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

tual, binding on court, contractor, and Government. *Sexton* v. *United States*, 82 C. Cls. 550, 553–554, 561–562; *H. B. Nelson Construction Co.* v. *United States*, 87 C. Cls. 375, 379, 384, 386; *S. M. Siesel Co.* v. *United States*, 90 C. Cls. 582, 598–9; *Dewey Schmoll, Assignee* v. *United States*, 91 C. Cls. 1, 31–32; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 637, 669; cf. *Thompson* v. *United States*, 91 C. Cls. 166; *J. W. Rumsey* v. *United States*, 88 C. Cls. 254.[16] The court has recently explicitly held that the related question of the rental value of equipment kept idle by the Government's delay is a factual issue on which the contracting officer's decision is final. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 112–113, certiorari denied, 312 U. S. 697.

General contract and commercial law similarly establishes that questions such as that determined by the contracting officer here are questions of fact. It is familiar learning that the determination in the ordinary common law case of the "reasonable price," "reasonable compensation," or "reasonable value" implied in contracts containing no other

[16] Similarly, the Court of Claims has frequently upheld a contracting officer's decision that a change order under Article 3 will cause an increase in the time required for the performance of the contract, the other factor specifically mentioned in the provision (e. g., *Carroll* v. *United States*, 76 C. Cls. 103, 113, 120, 124–127; *McShain Co.* v. *United States*, 83 C. Cls. 405, 407, 409), and has recently squarely characterized the issue as one of fact. *Ross Engineering Company, Inc.* v. *United States*, 92 C. Cls. 253, 260.

specific price term is generally one of fact for the jury. *United States* v. *Wilkins*, 6 Wheat. 135, 145; *United States* v. *Swift & Co.*, 270 U. S. 124, 141. In construction contracts, for example, if there is no provision for decision of disputed questions by the architect, or the engineer, or by arbitration, the issues of whether and to what extent a change increased the contractor's costs are jury questions. *Bates* v. *Carter Const. Co.*, 255 Pa. 200; *Hottinger* v. *Hoffman-Henon Co.*, 303 Pa. 283. In the common case where the contract provides for the valuation of extra work by the engineer or some other arbiter, his decisions are uniformly treated as determinations of fact and accorded the finality for which we here contend. 3 Williston, Contracts, §§ 800–802, p. 2251. And this Court has held that where one party refuses to submit a dispute under a clause requiring the determination of reasonable compensation for an invention to be made by arbiters, the issue of compensation is one of fact for the jury and not one of law for the court. *Humaston* v. *Telegraph Company*, 20 Wall. 20, 28; cf. 3 Williston, Contracts §§ 802, 803.[16]

A persuasive, even an *a fortiori*, analogy is furnished from the field of eminent domain. The

[16] Similarly, where the Court of Claims assumes independently to set an amount due to a contractor for increased costs incurred because of a change order, on the ground that the contracting officer has entirely failed to make any adjustment under Article 3 (*Karno-Smith Co.* v. *United States*, 84 C. Cls. 110, 124), the court's finding is clearly one of fact.

reasonable value of private property condemned for public use (which is ordinarily the equivalent of the just compensation demanded by the Fifth and Fourteenth Amendments) has always been held to be determinable by a non-judicial fact-finding tribunal. Indeed, it has frequently been argued and sometimes held that, in the absence of agreement, the finding must be made by a jury. *Vanhorne* v. *Dorrance*, 2 Dall. 304, 312–313 (C. C. Pa.); see Blair, *Federal Condemnation Proceedings and the Seventh Amendment* (1927) 41 Harv. L. Rev. 29. This Court has repeatedly held that the determination may constitutionally be made by such non-judicial arbiters as a referee, commissioners, appraisers, a board, a sheriff's jury, or the ordinary jury, as well as by a court. *Curtiss* v. *Georgetown and Alexandria Turnpike Company*, 6 Cranch 232; *Shoemaker* v. *United States*, 147 U. S. 282, 305–306; *Sweet* v. *Rechel*, 159 U. S. 380, 402–407; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557.[17] Many of the findings of such a body are, of course, findings of fact and have been explicitly characterized as such;[18] and in federal condemnation cases it is clear that, absent an express con-

[17] Condemnation statutes frequently provide for valuation by such tribunals. Cf, Blair, *supra*; *United States* v. *Hess*, 71 F. (2d) 78 (C. C. A. 8th); Orgel, *Valuation Under the Law of Eminent Domain*, § 7.

[18] *United States* v. *Jones*, 109 U. S. 513, 519; *Chappell* v. *United States*, 160 U. S. 499, 513; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 694–695.

trary directive in the statute, those findings of fact are accorded the usual finality.[19] *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547, 560; *Willis* v. *United States*, 99 F. (2d) 362, 365 (App. D. C.); *Johnson & Wimsatt* v. *Hazen*, 99 F. (2d) 384, 387 (App. D. C.); Orgel, *Valuation Under the Law of Eminent Domain*, § 128.

These principles are plainly decisive here. The contracting officer decided, over the contractor's objection, that it would not cost more than 14.43 cents per cubic yard to construct the enlarged berm. There can be no doubt that this disputed issue of the probable increase in cost is one of fact, for decision by a jury in a suit where trial by jury is had, and for the fact finding tribunal in other instances. Whatever be the merit of the Court of

[19] We do not suggest, of course, that all issues involved in valuation in eminent domain cases may be finally resolved by the nonjudicial fact-finding tribunal, even if the determination of the issues appears as findings or conclusions of fact. For in valuation the correctness of "findings of fact" may depend on the *legal issue* whether the tribunal made such findings on the basis of relevant or other legally permissible factors. And, for example, in cases where a landowner is seeking to predicate value on a future intended use of the property, the question whether he has met the legal test that such future use is not merely a speculative possibility but is reasonably probable is a question of law for the court. Such underlying legal bases for the findings of fact may vitiate the findings and is a legal issue, subject to full judicial review. Cf. Government brief on reargument, *United States ex rel. Tennessee Valley Authority* v. *Powelson*, No. 3, this Term. But, as we have shown (*supra*, pp. 23–25), there are no such legal questions involved in this case.

Claims' view that the contracting officer has no authority to decide "issues of law", it cannot further limit that officer's authority by defining the obvious issue of fact here involved as one of law. And since it is conceded that the contracting officer's reasonable determinations of fact are binding, and no attempt is made to show bad faith or arbitrary action, the respondent may recover nothing.

The decisions of this Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119, and *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, 452, cited by the court below (R. 14, 18) as requiring its conclusion that a question of law was here involved, are wholly inapposite. They merely hold that the terms "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act concerning plans of corporate reorganization are "words of art" which had acquired certain fixed meanings under prior decisions of this Court (308 U. S. at 115–119; 310 U. S. at 452), and that the question whether any plan of reorganization conforms to the statutory standard is for the court and not for the majority of the security holders. In reorganization cases there is no tribunal other than the court, established either by law or by contractual agreement, for the adjudication of the fairness or equity of a proposed plan. That function and that duty have been imposed by the Congress on the district courts. *Case* v. *Los Angeles Lumber Co., supra,* at

115. In referring to the issue before the district court as a "question of law" or a "legal question", this Court did not mean that under other statutes or agreements issues involved in a determination of "fairness" and "equity" could not be finally resolved by an appropriate non-judicial tribunal. Certainly this Court did not intimate that questions of measurement, calculation, and observation, issues of fact in the most universal sense, become matters of law when they are steps in a determination that a plan is fair or an adjustment equitable.[20]

C. *Even if the disputed issues are issues of law, a contracting officer's unappealed equitable adjustment under Article 3 is conclusive*

While we think it plain that here the only disputed issue was one of fact, we submit that even

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[20] *United States* v. *Smith*, 256 U. S. 11, also stressed below (R. 14–15) merely held (a) that a contractor could recover for extra work even though there had not been compliance with a contract provision requiring prior written agreement between the parties as to quantities and prices of extra work (256 U. S. at 13) because the engineer officer insisted that the additional work be done without a change agreement, and it was useless to solicit or expect any change by him, his conduct being "repellent of appeal or of any alternative but submission with its consequences" (256 U. S. at 16); and (b) that the engineer officer's decision that certain material was clay or boulders rather than limestone was so arbitrary that it could be disregarded (256 U. S. at 15–16). The officer had required the contractor to excavate for 18 cents a yard material similar to that for which $2.24 a yard had been paid him under a previous supplemental contract. The case obviously has no relevance here.

if called a determination of law, a contracting officer's equitable adjustment under Article 3 is binding, absent fraud or bad faith. Even were legal issues involved, the parties could validly agree to leave an equitable adjustment of the contract price, made necessary by changes in the contract, wholly to the contracting officer. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *Mason and Hangar Co.*, 260 U. S. 323; *English Const. Co., Inc.* v. *United States*, 43 F. Supp. 313, 314 (D. Del.). We submit that the parties have done so here.

The authority granted by Article 3 to the contracting officer to make equitable adjustment is not limited by the terms of that provision to issues of fact. It includes all disputes. The reference to Article 15 was intended, we believe, merely to apply the appeal procedure prescribed by the latter provision to the settlement of any disputed issues with respect to an adjustment under Article 3, and not to limit the contracting officer's authority, or that of the head of the department on appeal, to the settlement of issues of fact. In our view, the contracting officer was intended by the parties as the final arbiter of all disputes concern-

ing the proper equitable adjustment to be made under Article 3."[11]

This "normal and spontaneous" reading of the agreement (*Kirschbaum* v. *Walling*, October Term, 1941, No. 910, decided June 1, 1942) fully accords with the putative intention of the drafters of Article 3 to avoid the vexations and expensive litigation which would inevitably follow change orders if means were not provided for the contemporaneous settling of disputes by an arbiter. Cf. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553. The parties evidently envisaged that change orders would be frequent and, accordingly,

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[11] To read into Article 3 the same limitation upon the scope of disputes subject to adjustment as appears in Article 15, which is restricted to "disputes concerning questions of fact," would render superfluous the provision in Article 3 that "the dispute shall be determined as provided in Article 15 hereof," since factual disputes would in any case be subject to the latter Article. And that the scope of the disputes which may be adjusted under Article 3 is broader than the disputes referred to in Article 15 may further be gathered from Article 4 of the standard form of Government contract, providing for adjustments of cost and difference in time resulting from changes made by the contracting officer with the approval of the head of the department, by reason of subsurface or latent conditions at the site materially different from those shown in the drawings or specifications. Article 4 expressly requires that any increase or decrease of cost or difference in time resulting from such changes "shall be adjusted as provided in Article 3 of this contract."

disagreements as to the proper elements of the "equitable adjustment" would be many. Moreover, the questions involved in a determination of the adjustment to be made because of changed conditions, asserted to give rise to increased cost, are within the special competence of the contracting officer and the department heads, rather than of a court which has few established criteria and principles for making such adjustments. The procedure of conclusive administrative determination of all issues is therefore particularly appropriate.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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